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No. 88-1751

In The

Supreme Court of the United States

October Term, 1988

NORTHWEST FOREST RESOURCE COUNCIL, et al.,

Petitioners,

v.

PORTLAND AUDUBON SOCIETY, et al.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

REASONS FOR DENYING THE WRIT 4

I. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO RESOLVE THE RELATIONSHIP BETWEEN RULE 24 AND ARTICLE III STANDING, SINCE THE NINTH CIRCUIT RESOLVED THE CASE WITHOUT REACHING THE ISSUE 4

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER A PURELY ECONOMIC INTEREST REQUIRES INTERVENTION UNDER RULE 24(a)(2) 5

III. ECONOMIC INTERESTS HAVE NO RELATION TO THE INTERESTS INTENDED TO BE PROTECTED BY THE NATIONAL ENVIRONMENTAL POLICY ACT 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

American Motorcyclist Ass'n v. Watt, 534 F.Supp. 923 (C.D.Cal. 1981), *aff'd on other grounds*, 714 F.2d 962 (9th Cir. 1983) 11

Basin Electric Power Cooperative v. Department of Public Serv. Reg., 608 F.Supp. 772 (D.Mont. 1985) 11

Churchill Truck Lines, Inc. v. United States, 533 F.2d 411 (8th Cir. 1976) 11

City of Evanston v. Regional Transportation Auth., 825 F.2d 1121 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 697 (1988) 10

Clinton Comm'y Hosp. Corp. v. Southern Maryland Med. Ctr., 374 F.Supp. 450 (D.Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975) 11

Diamond v. Charles, 476 U.S. 54 (1986) 4, 5, 8

Donaldson v. United States, 400 U.S. 517 (1971) 6, 8

Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341 (10th Cir. 1978) 3, 6

Northern Spotted Owl v. Hodel, No. C88-573Z (W.D. Wa. Nov. 18, 1988) 1

Pacific Northwest Bell Tel. Co. v. Dole, 633 F.Supp. 725 (W.D.Wa. 1986) 11

Port of Astoria, Oregon v. Hodel, 595 F.2d 467 (9th Cir. 1979) 11

Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989) 3, 9

TABLE OF AUTHORITIES – Continued

Page

Portland Audubon Society v. Lujan, 9th Cir. No. 89-35337 3

Portland Audubon Society v. Lujan, No. 87-1160-FR (D.Ore. May 18, 1989) (Order and Opinion re: Summary Judgment) 3

Presidio Bridge Co. v. Secretary of State, 486 F.Supp. 288 (W.D.Tex. 1978) 11

Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir. 1981) (per curiam) 4, 6, 9

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) 5

Wade v. Goldschmidt, 673 F.2d 182 (7th Cir. 1982) (per curiam) 7

Zlotnick v. Redevelopment Land Agency, 2 ELR 20235, 20236 (D.D.C.), *aff'd*, 494 F.2d 1157 (D.C.Cir. 1972) 11

STATUTES

5 U.S.C. § 552 8

5 U.S.C. §§ 702-706 8

16 U.S.C. § 703 et seq. 1

16 U.S.C. § 1531 et seq. 1

42 U.S.C. § 4321 et seq. 1

42 U.S.C. § 4332 10

43 U.S.C. § 1181 1

43 U.S.C. § 1701 et seq. 1

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Federal Rule of Civil Procedure, Rule 24(a)(2) ..... *passim*

UNITED STATES CONSTITUTION

Article III 3, 4, 5

STATEMENT OF THE CASE

In this action, respondents Portland Audubon Society et al. (collectively, "PAS") challenge a 1987 decision by the federal Bureau of Land Management ("BLM") not to prepare a supplemental Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA").[1] PAS alleges that BLM's failure to address significant new information concerning the potential extinction of the northern spotted owl (a species found in – and dependent on – old-growth forests in the Pacific Northwest) violates NEPA. PAS seeks to have the BLM address in an EIS new information concerning the threat to the owl posed by the cumulative impacts of habitat fragmentation resulting from clearcut logging on BLM-administered lands in Oregon.[2]

NEPA imposes obligations only on the federal government, and PAS named only the Secretary of Interior as a defendant in the action. PAS seeks declaratory and

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[1] PAS' complaint also alleges violations of the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., the Oregon and California Lands Act, 43 U.S.C. § 1181, and the Federal Land Policy Act, 43 U.S.C. § 1701 et seq. Because Petitioners were granted intervention as to these non-NEPA claims, they play no role in the instant petition.

[2] As a result of a federal district court ruling in November 1988, *Northern Spotted Owl v. Hodel*, No. C88-573Z (W.D. Wa. Nov. 18, 1988) (Order of Remand), and in light of much of the same information that underlay PAS' claim in this case, the U.S. Fish & Wildlife Service has recently recommended adding the northern spotted owl to the list of threatened and endangered species under the Endangered Species Act, 16 U.S.C. § 1531 et seq. *See* Revised Finding and Supplemental Status Review, filed by federal defendants in *id.* (Apr. 25, 1989).

injunctive relief requiring BLM to prepare a supplemental EIS, and preventing BLM from offering or awarding future timber sales containing stands of trees older than 200 years within 2.1 miles of known spotted owl sites previously identified by the BLM, pending compliance with NEPA. PAS neither complains of nor seeks relief as to any other timber sales on BLM lands.

Petitioner Northwest Forest Resource Council (the "Council") and a group of bidders on BLM timber sales (the "H&W Group") (collectively, "NFRC") moved to intervene in this action. The sole interest asserted by these parties was economic. The Council is a coalition of ten timber industry groups, which alleged its members bid on and purchase timber from lands managed by the BLM. The H&W Group, in turn, includes timber producers and timber product companies which allegedly "submitted the high bid" on various timber sales from BLM lands. The Council and the H&W Group argued that these purely economic interests, standing alone, entitled them to intervene as of right in PAS' NEPA action pursuant to Federal Rule of Civil Procedure 24(a)(2).

Although the district court granted NFRC intervention as to PAS' other causes of action, it denied intervention on the NEPA claim. Petitioners' Appendix [Pets' App.] B at A-23; C at A-29-30. Having granted intervention on other claims, however, the district court specifically refused to place any restrictions on NFRC's participation in the case.

The district court granted BLM's motion to dismiss, and PAS appealed to the Court of Appeals for the Ninth Circuit. NFRC cross-appealed on the intervention issue.

The Ninth Circuit reversed the district court on PAS' appeal, remanding for further proceedings, but affirmed on NFRC's cross-appeal. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989).[3]

SUMMARY OF ARGUMENT

This is not an appropriate case for resolving the relationship between Rule 24(a)(2) and Article III standing requirements. The Ninth Circuit neither reached the issue nor relied on an independent standing requirement to deny intervention under Rule 24.

Moreover, there is no dispute between the Circuit Courts of Appeals for this Court to resolve. NFRC's purported "conflict" between the Ninth Circuit's holding in this case and the Tenth Circuit's ruling in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978) concerning the adequacy of a purely economic interest of an applicant for intervention in litigation involving the federal government simply does not exist. Indeed, the Tenth

[3] On remand, the district court recently held that BLM had acted arbitrarily and capriciously in failing to address new, significant and probably accurate information concerning the risk of extinction to the owl. *Portland Audubon Society v. Lujan*, No. 87-1160-FR (D.Ore. May 18, 1989) (Opinion re: Order Granting Summary Judgment). However, the court also held that its jurisdiction to review the case had been removed by Section 314 of the 1988 Budget Act, and therefore granted summary judgment to the BLM. The matter is currently once again on appeal to the Ninth Circuit. *Portland Audubon Society v. Lujan*, 9th Cir. No. 89-35337.

Circuit itself in *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849 (10th Cir. 1981) (per curiam) specifically rejected NFRC's thesis as "absurd." Such a rule also would be inconsistent with this Court's requirement that applicants for intervention demonstrate a "significantly protectable interest." Finally, the federal courts have uniformly rejected NFRC's contention that NEPA provides protection for purely economic interests.

In short, NFRC has failed to demonstrate grounds for granting the petition for writ of certiorari.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO RESOLVE THE RELATIONSHIP BETWEEN RULE 24 AND ARTICLE III STANDING, SINCE THE NINTH CIRCUIT RESOLVED THE CASE WITHOUT REACHING THE ISSUE

NFRC urges the Court to use this case to resolve whether a party seeking to intervene pursuant to Rule 24(a)(2) must also possess standing under Article III, an issue on which, as this Court has previously noted, the Courts of Appeals "have reached varying conclusions . . . ." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n. 21 (1986). But the Ninth Circuit specifically declined to address the relationship between Article III and Rule 24 in this case, explicitly referring to the dispute noted in *Diamond*, and instead resolved NFRC's intervention without reference to any independent standing requirement. Pets' App. A-15 n.1:

> [W]e in the past have resolved intervention questions without making reference to standing doctrine. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir. 1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n.21, 106 S.Ct. 1697, 1706-07, n.21, 90 L.Ed.2d 48 (1986) . . . . Without an en banc review, we must follow the *Sagebrush Rebellion* analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test.

Id.

Had the Ninth Circuit decided to adopt an independent standing requirement for intervention, and had the Court of Appeals relied on that standing limitation to deny NFRC intervention under Rule 24, this case might appropriately present the issue NFRC wants resolved. But NFRC asks the Court to ignore both the reasoning of the Ninth Circuit and its application of Rule 24(a)(2) to this case in order to resolve an issue not presented by the Court of Appeals' decision.

For this reason alone, the Court should deny the petition for certiorari.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER A PURELY ECONOMIC INTEREST REQUIRES INTERVENTION UNDER RULE 24(a)(2)

In resolving NFRC's application for intervention, the Ninth Circuit held that

> Although the intervenors have a significant economic stake in the outcome of plaintiffs' case, they have pointed to no 'protectable' interest justifying intervention as of right. *Donaldson [v. United States]*, 400 U.S. [517] at 531, 91 S.Ct. at 542 [(1971)].

NFRC argues that this holding conflicts with the Tenth Circuit's decision in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978) ("*NRDC*"). According to NFRC, *NRDC* stands for the proposition that Rule 24(a)(2) is "satisfied" wherever "a decision in favor of plaintiffs could have a substantial [economic] effect on the applicants. . . ." Petition at 7.

NFRC, however, seriously misstates the Tenth Circuit's position on this issue. Neither *NRDC* – nor any other case in the federal courts – holds that an applicant for intervention who might suffer an economic impact from the outcome of litigation involving the government necessarily possesses the "interest" needed to satisfy Rule 24(a)(2)'s threshold requirement for intervention, regardless of the statutory policies at issue in the case.

Indeed, the Tenth Circuit has, since *NRDC*, explicitly *rejected* NFRC's thesis that the mere presence of an economic interest in litigation involving the government's discretionary duties satisfies the interest requirement so as to support intervention as of right, calling any such rule "absurd." *See Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 851 n.4 (10th Cir. 1981) (per curiam). In *Rosebud*, the court denied intervention to a non-federal coal lessor (RME) in an action between a coal lessee (Rosebud) and the Department of Interior concerning the government's statutory, discretionary right to adjust royalty rates in

federal coal leases. RME's contract with Rosebud tied RME's royalties to those paid by Rosebud to the federal government. In other words, RME, like NFRC in this case, claimed a direct pecuniary interest in the outcome of the underlying litigation. Moreover, like NFRC here, RME's "only claim of interest is in support of the [government's] claim." *Id.*

The Tenth Circuit denied intervention. While the court acknowledged RME's direct economic interest in the outcome of the litigation, the court held that such a "tenuous" or "universal" interest was insufficient to justify intervention. *Id.* The court refused to allow a private party to "bootstrap" such an interest "into unwelcome partnership with the government every time it litigates over one of its discretionary . . . activities." *Id.*[4]

Exactly the same is true in this case. The Ninth Circuit refused to allow NFRC to "bootstrap" its purely economic interest – a "tenuous" and "universal" one at best – into intervention on the side of the government in this NEPA case. *Accord, Wade v. Goldschmidt*, 673 F.2d 182, 184-85 (7th Cir. 1982) (per curiam).

Nor is there any other case to the contrary. Neither this Court nor any other has ever held that an applicant for intervention on the side of the government in litigation involving the enforcement of public laws may rely solely on a potential economic interest in the outcome of

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[4] Moreover, the court discussed *NRDC* at some length, *id.* at 850 n. 3, explaining that the case illustrates the "fact dependence" of Rule 24, and that the facts in *NRDC* involved much more than a mere economic interest.

the case to satisfy Rule 24(a)(2). Rather, as this Court has made clear, Rule 24(a)(2) requires a "significantly protectable interest." *Diamond*, 476 U.S. at 68; *Donaldson*, 400 U.S. at 531. Yet, if NFRC's asserted interest in this case supported intervention of right, Rule 24(a) would be so broad as to let every party into every case that could affect its "interests," no matter how far removed from the zone of interests of the statutory schemes at stake.

The only property or "transaction" at issue in PAS' NEPA claim is a decision by the state director of the BLM not to prepare a supplemental EIS addressing the impacts of old-growth logging on the northern spotted owl. NEPA imposes obligations only on federal agencies.[5] It does not mention or apply to private citizens in any way. Although NFRC might benefit financially from BLM's *violations* of NEPA, an economic interest in statutory noncompliance should not provide the basis for intervention of right under Rule 24(a)(2).

Both the Tenth Circuit and the Ninth Circuit agree that

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[5] In this respect NEPA differs from most other federal laws, which regulate conduct of private parties and are administered by federal agencies. NEPA regulates the conduct of federal agencies themselves, and is "administered" by the Council on Environmental Quality ("CEQ") and the vigilance of private citizens who may seek judicial review of agency compliance with NEPA pursuant to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702-706.

> "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."

Portland Audubon Society v. Hodel, Pets' App. A at A-15-16; *Rosebud*, 644 F.2d at 850 n.3. Both Circuits agree that a private party cannot rely solely on a mere pecuniary interest in the outcome of litigation to justify intervention as of right on the side of the federal government. NFRC's asserted interest falls outside of any "practical guide" under *any* Circuit's reasonable test for intervention, and therefore fails to satisfy Rule 24.

In short, the conflict between the Circuits posited by NFRC on this point does not exist.

III. ECONOMIC INTERESTS HAVE NO RELATION TO THE INTERESTS INTENDED TO BE PROTECTED BY THE NATIONAL ENVIRONMENTAL POLICY ACT

NFRC asserts that the Ninth Circuit's conclusion that NEPA does not provide protection for purely economic interests "is contrary to the clear intent and language of the act." Petition at 13. NFRC cites no case in support of this bald assertion, and, in fact, NFRC is simply wrong.[6]

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[6] The assertion is not only wrong, it turns NEPA completely on its head. NEPA was adopted specifically to *counter* agency tendencies to consider only economic consequences of their actions. The language of NEPA quoted by NFRC in support of its argument that NEPA was intended to "protect" economic interests actually means something quite different than NFRC infers. NEPA section 102 provides, in pertinent part:

(Continued on following page)

Every federal court that has addressed the issue has concluded that the type of purely pecuniary interests asserted by NFRC in this case fall outside the zone of interests established by NEPA, and that parties asserting only such interests therefore lack standing to bring a NEPA lawsuit themselves. *See City of Evanston v. Regional Transportation Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987) (denying standing to the City of Evanston, its mayor, and

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> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations. . . .

42 U.S.C. § 4332. NFRC seizes upon and emphasizes the phrase "along with economic and technical considerations," as if that phrase somehow created a right or interest that NFRC may enforce. Petition at 14. But of course the emphasized phrase merely recognizes that there are *other* statutes that impose "economic and technical considerations" on federal agencies, and provides that NEPA is now adding an *additional* layer of consideration – one concerned *exclusively* with the *environmental* consequences of agency actions.

two aldermen who failed to allege "some distinct injury in fact to their *environmental* interests"), *cert. denied*, 108 S.Ct. 697 (1988); *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976) (plaintiffs "whose sole motivation . . . was their own economic self-interest and welfare, are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's *environmental* interest"); *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979) (denying standing based purely on "only pecuniary losses and frustrated financial expectations"); *Pacific Northwest Bell Tel. Co. v. Dole*, 633 F.Supp. 725, 727 (W.D.Wa. 1986); *Basin Electric Power Cooperative v. Department of Public Serv. Reg.*, 608 F.Supp. 772, 774-75 (D.Mont. 1985) (denying standing based on "increased electric rates"); *American Motorcyclist Ass'n v. Watt*, 534 F.Supp. 923, 933 (C.D.Cal. 1981), *aff'd on other grounds*, 714 F.2d 962 (9th Cir. 1983); *Presidio Bridge Co. v. Secretary of State*, 486 F.Supp. 288, 294 (W.D.Tex. 1978); *Clinton Comm'y Hosp. Corp. v. Southern Maryland Med. Ctr.*, 374 F.Supp. 450 (D.Md. 1974) (denying standing despite "real injury" resulting from building of a competing hospital), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975); *Zlotnick v. Redevelopment Land Agency*, 2 ELR 20235, 20236 (D.D.C.) (standing denied plaintiffs who "can at best claim only a remote, insubstantial, highly speculative and ephemeral interest in the environment"), *aff'd*, 494 F.2d 1157 (D.C.Cir. 1972). In short, NFRC fails to raise any significant question of federal law for this Court to resolve.

CONCLUSION

PAS does not dispute that the federal courts in other cases have differed over the proper relationship between Rule 24(a)(2) and Article III. But this case does not present an appropriate vehicle for resolving that dispute, since – despite NFRC's arguments – the Ninth Circuit specifically declined to adopt an independent standing requirement for intervention. Moreover, the purported conflict between this case and the Tenth Circuit's 11-year old ruling in *NRDC* simply does not exist, and is not supported by later caselaw in the Tenth Circuit. Finally, the federal courts are unanimous that purely economic interests do not support standing under NEPA.

In short, the petition for certiorari should be DENIED.

Respectfully submitted,

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